

STATE OF VERMONT  
HUMAN SERVICES BOARD

|           |   |                       |
|-----------|---|-----------------------|
| In re     | ) | Fair Hearing No. 9455 |
|           | ) |                       |
| Appeal of | ) |                       |

INTRODUCTION

The petitioners, who are foster care licensees, appeal an SRS (the Department of Social and Rehabilitation Services) decision not to place two children who had formerly been in their care with them for adoption. The department has moved to dismiss this case for lack of statutory and/or subject matter jurisdiction on the part of the board and lack of standing on the part of the petitioners to bring this appeal.

FINDINGS OF FACT

For purposes of the motion, the parties have agreed to the following facts:

1. The petitioners are foster care providers licensed by SRS to care for a maximum of two children.
2. At some time in the recent past, SRS placed two young sisters in the care of the petitioners on a temporary basis. At that time, the children were not available for adoption. Following the termination of that temporary care, the petitioners continued to have contact with the children and provided respite foster care for them.
3. A few months ago, the children's mother approached the petitioners about adopting her children. The

petitioners referred her to SRS and, because the petitioners had another foster child in their care and wanted some time to think about the adoption, the children were placed temporarily in another foster home.

4. The children's mother did relinquish them for adoption but allegedly specified that such relinquishment was conditioned upon the children being placed in a home other than the petitioners'.

5. Based on the mother's alleged preference, and on other information which was developed by SRS, a determination was made not to place the children with the petitioners.

6. The petitioners asked the Commissioner to review that decision and a meeting was held for that purpose attended by the petitioners, the Commissioner himself, and several other persons involved in the decision. Following that review, the Commissioner issued a letter dated November 1, 1989, which is incorporated herein and attached as Exhibit 1.

7. The petitioners appeal for relief from that decision alleging that it was made in violation of federal and state policies protecting the best interests of children, that it was arbitrary, capricious and an abuse of discretion. They also ask for a ruling on the department's refusal to provide them with requested documents.

PROCEDURAL HISTORY

After filing their appeal, the petitioners, who are

proceeding pro se, asked the hearing officer to subpoena certain witnesses pursuant to Human Services Board rules and asked the department to see certain documents with regard to this matter. SRS filed a motion to dismiss on jurisdictional grounds and opposed the subpoenas until a ruling was made on the motion. A hearing was held on the motion at which time the petitioners maintained that as foster care licensees who were aggrieved by agency policy, they had a right to a hearing before the Human Services Board. SRS countered that the petitioners are appealing as potential adoptive parents and are not appropriate appellants under 3 V.S.A. § 3091(a) and have no legally protected interest on which the board could grant relief. The petitioners believing that interpretation to be incorrect, were given an opportunity to submit a more complete statement regarding their appeal including the issues and law which they relied upon. After so doing, the department filed another motion to dismiss and a second hearing was held thereon.

ORDER

The department's motion to dismiss is granted.

REASONS

The statute governing appeals to the Human Services Board provides as follows:

An applicant for or a recipient of assistance, benefits or social services from the department of social and rehabilitation services, the department of social welfare, the office of child development, the office of economic opportunity, the office on aging, or an

applicant for a license from one of those departments or offices, or a licensee, may file a request for a fair hearing with the human services board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his claim for assistance, benefits or services is denied, or is not acted upon with reasonable promptness; or because he is aggrieved by any other agency action affecting his receipt of assistance, benefits or services, or his license or license application; or because he is aggrieved by agency policy as it affects his situation.

3 V.S.A. § 3091(a).

The petitioners argue, in this case of first impression, that they have a right to a fair hearing before the Human Services Board because they are "licensees" of SRS who are aggrieved by "agency policy as it affects [their] situation." The department maintains that even though they are licensees, the petitioners may only appeal a decision affecting their license. The department asks that the case be dismissed because the petitioners' attempt to grieve a decision by the agency regarding the placement of children for adoption is not a decision affecting their license.

The language of the statute at 3 V.S.A. § 3091(a) does not support the department's contention. The second sentence of the statute enumerates several specific grounds for appeal and finally adds a "catch-all" provision which allows an "individual"<sup>1</sup> to appeal who "is aggrieved by agency policy as it affects his situation." This broad language authorizes any individual listed in the first sentence to take a grievance with regard to any action the department might take which affects him, without

restriction. In this case, it must be concluded, that the statute authorizes the petitioners as foster care licensees to come before the board with any grievance the petitioners may have with regard to a policy of the agency which affects them, whether or not it also directly affects their license. Therefore, as foster care licensees who are aggrieved by the department's policy regarding placement for adoption of foster care children, the petitioners are entitled to request a hearing before the board, and their petition should not be dismissed for that reason.

The opportunity to be heard which the petitioners have been guaranteed by statute does not, however, guarantee a hearing on the merits. The board is still required under traditional considerations of jurisprudence and its own regulations (see Fair Hearing Rule No. 8) to rule on preliminary matters which may obviate the need for a hearing on the merits, either because there is no conceivable legal basis for the claim or because issues of justiciability (ripeness, standing, etc.) are raised.

In this matter, the department attacked the "standing" of the petitioners to assert their claim, contending that the petitioners are not legally protected by SRS or federal statutes or regulations in their capacities either as foster parents or potential adoptive parents. The petitioners were asked to, and did, respond to a request to detail the grounds for their appeal and to offer those statutes or regulations which protect them in this situation and provide

a basis for relief from the board. The petitioners provided such a statement and based their claim for relief on the following SRS regulation and federal statute:

Adoptive assistance is provided for families adopting special needs children. The Department must determine that the following criteria for special needs are met:

1. The child cannot or should not be returned to the home of his/her parents;
2. There exists with respect to the child a specific factor or condition which makes it reasonable to conclude that the child cannot be placed with adoptive parents without providing assistance. Such conditions included his/her race or ethnic background, age, membership in a sibling group, or the presence of factors such as medical conditions, physical, mental, or emotional handicaps. and
3. Except where it would be against the best interest of the child, reasonable but unsuccessful efforts have been made to place the child with appropriate adoptive parents without adoption assistance.

SRS Regulation 5035.1

and,

Except where it would be against the best interest of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child, a reasonable, but unsuccessful effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section.

42 USC 601.

It cannot be concluded after reviewing the regulation and statute referred to by the petitioners that they afford any legal protection to them as either foster parents or potential adoptive parents. Even if the petitioners were to put on their entire case, including the half-dozen or so

witnesses whom they have asked to subpoena, and were to prove all the facts alleged by them in this matter, they have presented no legal basis upon which the board could grant them any relief. The law cited by the petitioners is clearly aimed at protecting children (and perhaps their natural parents) and describes the benefits and services available to those children, not anyone else. As such, it must be concluded that the petitioners lack any enforceable legal interest in this matter and have failed to state a claim in their appeal upon which the board could grant any relief. It is, therefore, incumbent upon the board to dismiss the matter for the sake of all the parties, at its earliest opportunity.

If the petitioners represented the children in this matter, which they do not, they would no doubt be on firmer ground in asking for relief, but would probably face another obstacle which is similarly formidable--namely, subject matter jurisdiction. The relinquishment and adoption of minors is statutorily within the jurisdiction of the probate court. See 15 V.S.A. § 434, et. seq. Unlike In re Kirkpatrick, 147 Vt. 637, 523 A.2d 1251 (1987), in which the Supreme Court determined that the Human Services Board has the ability to hear matters which are related to but not part of the "proceedings" in juvenile court matters, the subject matter of this appeal goes to the heart of an adoption proceeding, namely the placement decision itself, and cannot be considered a matter so tangential to the

adoption process as to confer any jurisdiction on the Board.

The petitioners here appear to be sincere in their concern for these children and frustrated at their apparent inability to legally play any role in deciding their future even though they allege a parent-like emotional bond with them and a moral responsibility to see that these children's best interests are served. They have been advised repeatedly to obtain an attorney to see if there might be some other avenue of recourse. It is extremely unfortunate that this matter has created such an adversarial relationship between the department and a family who has from all appearances provided excellent foster care to children in the department's custody. It is hoped that the department and the petitioners can and will take steps with regard to restoring their relationship to the extent that it might be possible, both to further the welfare of the children at issue and others who may need help.

FOOTNOTE

<sup>1</sup>The term "individual" refers back to those claimants enumerated in the first sentence of the paragraph and is not a general grant of jurisdiction. See Fair Hearing No. 260

# # #